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# Documents of Title under the Uniform Commercial Code—Article 7

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## DOCUMENTS OF TITLE UNDER THE UNIFORM COMMERCIAL CODE—ARTICLE 7

Daniel Stubbs\*

### I

Article 7 of the Uniform Commercial Code relates to documents of title in the area covered by the Uniform Warehouse Receipts Act, the Uniform Bills of Lading Act and that part of the Uniform Sales Act dealing with documents of title.

A substantial caveat is important. Section 7-103 excludes from the operation of the Act two substantial areas.

1. It does not apply where federal law is paramount. Thus the Federal Bills of Lading Act<sup>1</sup> applies to bills of lading issued for interstate and foreign shipments. The Carmack Amendment<sup>2</sup> to the Interstate Commerce Act affects interstate bills of lading. Ocean bills of lading are covered by the Carriage of Goods by Sea Act.<sup>3</sup>

2. Also excluded from the reach of the Code are matters controlled by state regulatory statutes and the tariffs, regulations and classifications issued pursuant to them. Nebraska has an act for the licensing of warehousemen generally,<sup>4</sup> the licensing and regulation of public grain warehouses<sup>5</sup> and the licensing and regulation of warehousing grain on farms.<sup>6</sup> The licensing agency in each case is the Nebraska Railway Commission. Insofar as the provisions of these Acts are inconsistent with the Uniform Commercial Code, the regulatory acts control.

Articles 2 and 3 of Chapter 88 of the Nebraska statutes were inadvertently repealed in the passage of the Code in Nebraska, but these provisions will undoubtedly be reinstated by the 1965 Legislature before the Code becomes effective.

Of the three prior uniform acts which Article 7 of the Uniform Commercial Code revises, Nebraska has adopted two.

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<sup>1</sup> 49 U.S.C. §§ 81 to 124 (1946).

<sup>2</sup> 49 U.S.C. § 20 (1946).

<sup>3</sup> 46 U.S.C. §§ 1300-15 (1946).

<sup>4</sup> NEB. REV. STAT. §§ 88-159 to 165 (Reissue 1958).

<sup>5</sup> NEB. REV. STAT. §§ 88-201 to 221 (Reissue 1958).

<sup>6</sup> NEB. REV. STAT. §§ 88-301 to 316 (Reissue 1958).

The Uniform Warehouse Receipts Act (UWRA) was adopted by Nebraska in 1909.<sup>7</sup> Nebraska adopted the sections of the Uniform Sales Act (USA) relating to documents of title in 1921.<sup>8</sup> The Uniform Bills of Lading Act (UBLA) has never been adopted by Nebraska.

## II

The definition of "document of title" in section 1-201(15) follows closely the definition in the USA.<sup>9</sup> It is, however, rephrased and broadened.

A document of title is first, a receipt for the goods by the issuer; second, a contract between the issuer and the depositor; third, a document of title.

A receipt or a contract becomes a document of title only if "in the regular course of business or financing" it is treated "as evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers."<sup>10</sup>

Added to the old definition is a requirement that the document purport to be addressed to or issued by a *bailee* and purport to cover goods in the bailee's possession. This excludes a conditional sales contract.<sup>11</sup>

The official comment states that the language is designed to include any future document which may be generated by changing and faster business methods if the document meets the "regular course" test.<sup>12</sup>

The Code definition specifically includes bills of lading and warehouse receipts (which are separately defined), and delivery orders, dock warrants and dock receipts. However, the comment indicates that not all dock receipts, warrants and delivery orders are documents of title because they fail to meet the "regular course" test.<sup>13</sup>

The law of Nebraska is changed to the extent that the Code changes the USA definition of documents of title.

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<sup>7</sup> NEB. REV. STAT. §§ 88-101 to 158 (Reissue 1958).

<sup>8</sup> NEB. REV. STAT. §§ 69-427 to 440 (Reissue 1958).

<sup>9</sup> NEB. REV. STAT. §§ 69-476 (Reissue 1958).

<sup>10</sup> UNIFORM COMMERCIAL CODE § 1-201(15) (Hereinafter cited as U.C.C.).

<sup>11</sup> *Ibid.*

<sup>12</sup> U.C.C. § 1-201 Comment 15.

<sup>13</sup> *Ibid.*

## III

## THE DOCUMENT

## FORM OF DOCUMENT

A warehouse receipt is a receipt issued by a "person engaged in the business of storing goods for hire."<sup>14</sup> A warehouseman is defined as "a person engaged in the business of storing goods for hire."<sup>15</sup> Previously, the UWRA defined "warehouseman" as "one lawfully engaged in the business of storing goods for profit."<sup>16</sup> The former definition excluded state and cooperative warehouses, now covered by the change of language. As adopted in Nebraska, the UWRA used the word "compensation"<sup>17</sup> rather than "profit" so it would seem the Nebraska law is not changed in this respect.

The requirement that goods be stored for "hire" eliminates one who stores his own goods. Section 7-201(2) however includes one who stores his own goods under a statute requiring a bond or a license. This was the result reached in a Nebraska case in 1928.<sup>18</sup> This case arose under the warehouse licensing statute enacted in 1915,<sup>19</sup> which has been repealed but which will undoubtedly be reinstated before September, 1965. The prior Act limited a warehouseman to one "lawfully engaged" in the business of storing goods. With the elimination of this language the issuer is bound even though he is not a warehouseman.

## TERMS OF THE DOCUMENT

*Warehouse Receipts*

Section 7-202 with respect to warehouse receipts is essentially the same as the corresponding section of the UWRA.<sup>20</sup> In 7-202(e) "rate of storage and handling charges" is substituted for "rate of storage" and "lien or security interest" for "lien." Under the language of the prior act a failure to include essential terms may mean that the document is not a warehouse receipt. The Uniform

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<sup>14</sup> U.C.C. § 1-201(45). See also § 7-201(1).

<sup>15</sup> U.C.C. § 7-102(1) (h).

<sup>16</sup> NEB. REV. STAT. § 88-158(15). (Reissue 1958).

<sup>17</sup> NEB. REV. STAT. § 88-158(16) (Reissue 1958).

<sup>18</sup> First Nat'l Bank of Lincoln v. Lincoln Grain Co., 116 Neb. 809, 219 N.W. 192 (1928).

<sup>19</sup> NEB. REV. STAT. § 88-160 (Reissue 1958).

<sup>20</sup> See NEB. REV. STAT. §§ 88-102, 103 (Reissue 1958).

Commercial Code leaves no doubt that the issuer is obligated under the Code even though the document may leave out essential terms.<sup>21</sup>

The issuer is made liable for damages caused by the omission of any essential terms without limit. Other optional terms are permitted which do not conflict with the Code and which do not limit the issuer's duty of care.

### *Bills of Lading*

No essential terms are provided for a bill of lading apparently on the theory that forms are prescribed by the regulating agencies.<sup>22</sup> The ICC has provided forms for railroads and they are used both for interstate and intrastate shipments. The straight or non-negotiable bill of lading is printed on white paper; the order bill of lading on yellow.

Generally, a bill of lading is a document evidencing the receipt of goods for shipment issued by a person in the business of transporting or forwarding goods.

### *Freight Forwarders Bill*

Freight forwarders engage in the business of consolidating less than car load shipments into carload lots to obtain the benefit of carload rates. They are common carriers under federal law.<sup>23</sup> Customers of a forwarder are issued bills of lading for a part of the shipment supplied by the customer. Upon shipment, the transporter issues a bill of lading to the freight forwarder. Section 7-503(3) provides that the carrier is protected in following the terms of its own bill of lading but title to the goods is subordinated to the bills of lading issued by the freight forwarder. This probably imposes on the railroad direct liability to the freight forwarder's principal, and thus may subject the railroad to a multiplicity of suits, but this was true under the prior law.<sup>24</sup>

### *Through Bills*

The Carmack Amendment makes the initial carrier responsible for any damage to the property transported caused by it or by any connecting carrier.<sup>25</sup> Section 7-302 of the Code follows the Carmack

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<sup>21</sup> U.C.C. § 7-401(a).

<sup>22</sup> U.C.C. § 1-201(6).

<sup>23</sup> 49 U.S.C. § 1002(a) (5) (1946).

<sup>24</sup> BRANCHER, DOCUMENTS OF TITLE, p. 14.

<sup>25</sup> 49 U.S.C. § 20(11) (12) (1946).

Amendment and gives the initial carrier a right over against the connecting carrier in whose hands the breach occurred. The Code section does not require that a through bill of lading be issued which the Carmack Amendment does require. Bear in mind, however, that the Uniform Commercial Code applies only to an intrastate shipment.

The Nebraska court has construed section 74-712 of the Nebraska Statutes to mean that a railroad which contracts to make delivery to a point beyond its own line is liable for the default of the connecting carriers and cannot limit its liability to defaults on its own line.<sup>26</sup>

### *Bills In A Set*

Section 7-304 prohibits the issuance of bills in a set "except where customary in overseas transportation." This continues the provisions of the UBLA which Nebraska has never adopted. If lawfully issued, the carrier is protected by delivery of the goods to the holder first presenting his part.

### *Destination Bills*

Section 7-305 is a new provision to take care of the situation where the goods by fast freight arrive before the bill of lading can arrive by mail. This section authorized the carrier to issue a Bill of Lading at the delivery point by means of telegram at the request of the issuer or holder of an outstanding bill, upon its surrender.

### NEGOTIABILITY

Section 7-104 makes negotiability depend on the precise terms of the document; if the document names the person to whom the goods are to be delivered as bearer, or to the order of a named person, the document is negotiable; in all other cases it is non-negotiable. This conforms to prior law.<sup>27</sup> The provision is very important because the holder of a negotiable document may obtain more rights than his transferor had.

The negotiable document more effectively represents the goods since the bailee is under a duty *not* to deliver the goods without surrender of the document. Bailees often include a provision requiring the delivery of the goods only on surrender of the receipt

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<sup>26</sup> Nye Schneider Fowler Co. v. C. & N.W. Ry. Co., 105 Neb. 151, 179 N.W. 503 (1920).

<sup>27</sup> NEB. REV. STAT. §§ 69-427 and 88-105 (Reissue 1958).

even though the receipt is otherwise in non-negotiable form. Section 7-104(2) makes it clear that such a requirement will not make negotiable an otherwise non-negotiable bill of lading.

The Code does not require that a warehouse receipt have its character as "negotiable" or "non-negotiable" plainly marked on its face, and, to this extent it is a change in the law.<sup>28</sup>

#### DUPLICATES

Section 7-402 adopts the requirements of the UWRA<sup>29</sup> on duplicates *and extends them to a non-negotiable document*. The document must be plainly marked as a duplicate, and a duplicate, whether marked or not, confers no right in the goods. The issuer is made liable for any damages caused by his failure to identify the document as a duplicate. In addition, any document purporting to cover the same goods by the same issuer is treated as an unmarked duplicate.

Documents issued by someone other than the issuer, such as a delivery order issued by the holder of a warehouse receipt or a freight forwarder's bill of lading, are covered by section 7-503-(2) (3). The rights under the delivery order are subordinate to rights of a holder of the negotiable warehouse receipt until the delivery order is accepted and the receipt surrendered. In the case of a bill of lading issued by a freight forwarder, rights under the freight forwarder's bill are superior to the carrier's bill of lading but the carrier is protected upon delivery pursuant to its own bill of lading.

#### ALTERATIONS AND BLANKS

There is a different treatment for negotiable warehouse receipts than for bills of lading with respect to the unauthorized filling of blanks. Section 7-208 provides that a purchaser for value without notice may treat the insertion in a warehouse receipt as authorized. The filling in of a blank in a bill of lading leaves the document enforceable according to its original tenor.<sup>30</sup> Any other alteration leaves the document enforceable against the issuer according to its original tenor.

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<sup>28</sup> See NEB. REV. STAT. § 88-107 (Reissue 1958).

<sup>29</sup> See NEB. REV. STAT. § 88-106 (Reissue 1958).

<sup>30</sup> U.C.C. § 7-306.

## IV

## LIABILITIES OF THE BAILEE

## NONRECEIPT

Where an agent issued a warehouse receipt without receiving any goods, it was held at common law that the warehouseman was not bound.<sup>31</sup> The UWRA sought to change this,<sup>32</sup> but after its adoption the Massachusetts court thought that the language did not do so and followed the common law rule.<sup>33</sup> An amendment to the UWRA was recommended in 1922 to correct this, but Nebraska did not adopt the amendment. It may be that the Nebraska court would follow the Massachusetts rule if the question were presented. Section 7-203 makes it clear that the issuer is responsible on the document even though no goods were actually received. Section 7-301 (1) protects the holder of a negotiated bill of lading or the consignee of a non-negotiable bill of lading for nonreceipt in the same way.<sup>34</sup>

There is an exception where the issuer does not know what he has received, as where the description is in terms of marks or labels, "contents unknown" or the like, "shippers weight, load or count" and the like, if such description is true. In such cases, the Code requires that such statements must be conspicuous,<sup>35</sup> except in bills of lading.<sup>36</sup> "Conspicuous" is defined in section 1-201(10): capitals, contrasting type or colors, or when a reasonable person ought to have noticed it.

## LOSS AND DAMAGE

For loss or injury to the goods, both the warehouseman<sup>37</sup> and the carrier<sup>38</sup> are held to a standard of reasonable care. This is consistent with the prior law.<sup>39</sup> The bailee has the burden of proving that reasonable care was used.<sup>40</sup>

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<sup>31</sup> WILLISTON, SALES § 419 (rev. ed. 1948).

<sup>32</sup> NEB. REV. STAT. § 88-120 (Reissue 1958).

<sup>33</sup> *Rosenberg v. National Doc.*, 218 Mass. 518, 106 N.E. 171 (1914).

<sup>34</sup> See also U.C.C. § 7-102(1)(g).

<sup>35</sup> U.C.C. § 7-203.

<sup>36</sup> U.C.C. § 7-301.

<sup>37</sup> U.C.C. § 7-204.

<sup>38</sup> U.C.C. § 7-309.

<sup>39</sup> NEB. REV. STAT. § 88-121 (Reissue 1958).

<sup>40</sup> U.C.C. § 7-403(1)(b).



The warehouseman may limit his liability by setting forth a specific liability per article or item,<sup>41</sup> or value per unit of weight. The UWRA did not contain any such provision. In *Gesford v. Star Van & Storage Co.*,<sup>42</sup> the Court held that a contract of bailment may diminish the liability of the bailee so long as it did not exempt the bailee from its own negligence. The only limitation in the Code is that it is not effective if the bailee converts to his own use.

Section 7-309 applies the same rules to a bill of lading. A carrier may limit liability if it is stated in the bill. The Carmack Amendment established the validity of such provisions in interstate rail transportation.<sup>43</sup>

Whether the Code provision can be applicable to intrastate rail transportation depends on the interpretation given to Article X, Section 4, of the Nebraska Constitution which reads: "The liability of railroad corporations as common carriers shall never be limited." This probably avoids the application of the Code provisions in this respect to railroads. It nevertheless will apply to other means of transportation.

#### PROCEDURAL LIMITATIONS

The Code permits reasonable limitations as to the time and manner of presenting claims and instituting actions.<sup>44</sup> This is new with respect to warehouse receipts. What is reasonable has been tested in a number of cases.<sup>45</sup> Under the Carmack Amendment, the shortest time permitted for filing claims is nine months and for instituting suit is two years from the day when the carrier disallows the claim in writing. In intrastate commerce, one state has held reasonable a requirement that a claim be filed within thirty days of delivery.<sup>46</sup>

Query whether such a limitation is a limitation of liability which is prohibited with respect to a railroad by the Nebraska Constitution.<sup>47</sup>

#### DELIVERY

Section 7-403 places the bailee under a duty to deliver the goods unless the bailee establishes one of seven defenses, and the

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<sup>41</sup> U.C.C. § 7-204(2).

<sup>42</sup> 104 Neb. 453, 177 N.W. 794 (1920).

<sup>43</sup> 49 U.S.C. § 20 (1946).

<sup>44</sup> U.C.C. §§ 7-210; 7-308.

<sup>45</sup> 4 WILLISTON, CONTRACTS, § 1112 (rev. ed. 1936).

<sup>46</sup> *Home Ins. Co. v. L.A. Warehouse*, 16 Cal. App. 2d 737, 61 P. 2d 510 (1936).

<sup>47</sup> NEB. CONST. art. X, § 4.

burden of proof is placed on the bailee. There is little change in the present law.

Section 7-403(1) (a) recognizes an outstanding paramount title. A thief cannot create any rights in the goods by depositing them in a warehouse or by delivering them to a common carrier.<sup>48</sup> But the true owner may have to pay the bailee for storage or transportation unless the bailee had notice of the lack of authority of the consignor.<sup>49</sup>

Delivery of the goods by a carrier without requiring surrender of a negotiable document is made at the peril of the carrier whether the delivery is partial or in whole.<sup>50</sup>

Section 7-404 protects the bailee for delivery to the wrong person or delivery under a document issued to a thief if the bailee acts in good faith, including observance of reasonable commercial standards. This is consistent with prior law.<sup>51</sup> Otherwise, delivery to the wrong person subjects the bailee to absolute liability.

In the case of conflicting claims, the bailee is given time to investigate by section 7-603 and he may interplead the adverse claimants. Prior law agrees.<sup>52</sup>

#### LOST DOCUMENTS

Where the bailee is under a duty to require surrender of the document before delivery, a problem arises when the document is lost. Section 7-601(a) provides that the bailee may be exonerated from liability by complying with a court order. The court may require the claimant to post security and to pay the bailee's reasonable costs and counsel fees.

Without a court order the bailee may accept security from the claimant in the amount of double the value of the goods.<sup>53</sup> This is a revision and expansion of the prior law.<sup>54</sup>

Interpleader may not be satisfactory where the goods are perishable or where the value of the goods may be consumed by storage charges before the case is tried. In such a case, the bailee

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<sup>48</sup> NEB. REV. STAT. § 88-109 (Reissue 1958). See *Shellenberger v. Fremont, E & M. V. Ry.*, 45 Neb. 487, 63 N.W. 859 (1895).

<sup>49</sup> U.C.C. §§ 7-307, 7-403(2).

<sup>50</sup> U.C.C. § 7-403(3). For prior law NEB. REV. STAT. § 88-108 (Reissue 1958).

<sup>51</sup> NEB. REV. STAT. §§ 88-108, 109, 110 (Reissue 1958).

<sup>52</sup> NEB. REV. STAT. §§ 88-116, 117 (Reissue 1958).

<sup>53</sup> U.C.C. § 7-601(b).

<sup>54</sup> NEB. REV. STAT. § 88-114 (Reissue 1958).

would be wise to obtain an agreement of the parties to sell the goods and deposit the proceeds subject to disposition by the court.

#### DIVERSION

It is often important that the original instructions for delivery in the original document be changed. The bailee must be clearly authorized to obey the instructions of someone. Section 7-303 sets out definitely who may change the terms relative to delivery and, in general, gives that right to the person to whom delivery is authorized. Of course, in the case of a negotiable document, the change should be clearly noted on the document or the bailee may be liable for misdelivery if the document is later negotiated.

### V

#### THE BAILEE'S LIEN

##### CHARGES COVERED

The liens provided for the warehouseman and the carrier are substantially different. The warehouseman has a specific lien for usual charges for storage and transportation with respect to the goods stored which attaches automatically without any statement in the warehouse receipt.<sup>55</sup>

In addition, the warehouseman may have a lien for like charges with respect to other goods stored by the consignor, even if those goods have been delivered, if it is stated in the warehouse receipt that such a lien is claimed. If the receipt is negotiable, the statement must include the charges or the rate, otherwise the lien is good for a reasonable rate only.

Thirdly, the warehouseman may have a lien for a "security interest" for money advanced and interest. This requires a statement on the receipt which recites the maximum amount. The security interest is perfected by possession and filing is not required. This interest is made subject to article 9 and so would cover subsequent advances within the maximum amount stated in the receipt.

The specific lien with respect to the goods covered by the receipt runs from the date the goods are received, not from the date of the receipt as in prior law.<sup>56</sup>

Section 7-307 gives a carrier a specific lien with respect to the goods covered by a bill of lading similar to the warehouseman's

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<sup>55</sup> U.C.C. § 7-209(1).

<sup>56</sup> NEB. REV. STAT. §§ 88-127, 128, 130 (Reissue 1958).

specific lien. No provision is made for a general lien or security interest with respect to a bill of lading. The Nebraska law provides for a specific lien with respect to property transported by a railroad.<sup>57</sup>

#### UNAUTHORIZED STORAGE AND SHIPMENT

If the goods are deposited by a thief, the warehouseman has no lien. If the goods are deposited by one entrusted with them by the true owner, even though the deposit is unauthorized, the lien attaches.<sup>58</sup> Of course, if the warehouseman has notice of the lack of authority, the lien is defeated but notice means actual knowledge or "reason to know" from facts actually known.<sup>59</sup> A public record does not seem to constitute notice, so a mortgagor might subordinate the mortgage to a bailee's lien. As to the "security interest" of a warehouseman which is controlled by article 9, a properly filed financing statement will take precedence over the bailee's lien.

With respect to a bill of lading, a carrier's lien may attach even though the goods are shipped by a thief if the goods are those which a carrier is required by law to accept.

#### ENFORCEMENT OF LIEN

A lien is lost by voluntary delivery or by an unjustified refusal to deliver.<sup>60</sup> This restates the law of the UWRA.<sup>61</sup>

The Code provides two distinct procedures for enforcement of the lien by sale, contrary to prior law which required that all sales be at public auction. Warehousemen, in cases of storage by a merchant in the course of his business, and carriers, in all cases, may choose between the two. Sale at public auction after notification to persons known to claim an interest is required in the case of non-commercial storage, which is said to include principally the storage of household goods by private persons.<sup>62</sup>

In all other cases, the warehouseman or the carrier may sell at public or private sale and may purchase the goods as bailee. The only test is that the sale must be commercially reasonable, which

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<sup>57</sup> NEB. REV. STAT. § 74-820 (Reissue 1958).

<sup>58</sup> U.C.C. § 7-209(3). See NEB. REV. STAT. § 88-128 (Reissue 1958).

<sup>59</sup> U.C.C. § 1-201(25).

<sup>60</sup> U.C.C. §§ 7-209(4), 307(3).

<sup>61</sup> NEB. REV. STAT. § 88-129 (Reissue 1958).

<sup>62</sup> U.C.C. § 7-210(2).

is not defined. A good faith purchaser is protected despite non-compliance by the bailee. The goods may be redeemed at any time prior to the sale and proceeds of the sale in excess of the amount of the lien are held for the person for whom the goods were held.

With respect to unclaimed perishable goods shipped by railroad, the provisions of sections 74-821 to 74-823 of the Nebraska Statutes seem to govern.

#### TERMINATION OF STORAGE

Where the period for storage is fixed, the bailment terminates and the warehouseman may proceed to enforce his lien after notification to the persons known to claim an interest.<sup>63</sup>

The more common case is storage for an indefinite period. The Code permits the warehouseman to require removal of the goods and payment of his charges at any time, without cause, upon thirty days notice. If the goods are not then removed, he may proceed to sell them under the provision relating to enforcement of the lien.

Exceptions to the general rules, with much shorter times for notice, are provided for goods about to decline in value below the amount of the lien or for goods which are hazardous.<sup>64</sup> These provisions follow prior law<sup>65</sup> except that hazardous goods are limited to conditions of which the warehouseman had no knowledge at the time of deposit and hazards are not limited to odor, leakage, inflammability or explosive nature, as in the UWRA.

### VI

#### NEGOTIATION AND TRANSFER

##### DUE NEGOTIATION

A bona fide purchaser of a negotiable document gets full protection only if he takes by "due negotiation." This is spelled out in section 7-501. The requirements are (1) negotiation, (2) good faith, (3) without notice, (4) value, (5) regular course, (6) a transaction other than settlement or payment of a money obligation.

(1) Negotiation follows the traditions of the law of negotiable instruments. An order document requires indorsement and delivery. A bearer instrument requires delivery alone, but it may be

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<sup>63</sup> U.C.C. § 7-206(1).

<sup>64</sup> U.C.C. § 7-206(2).

<sup>65</sup> NEB. REV. STAT. § 88-134 (Reissue 1958).

changed to an order instrument by a restrictive indorsement. There is no change in prior law.<sup>66</sup>

(2) Good faith is defined in section 1-201(19) to mean "honesty in fact." There is an added requirement that the negotiation be in the regular course of business or financing. It is not clear what this means, but the comment to section 7-501 states:

There are two aspects to the usual and normal course of mercantile dealings, namely, the person making the transfer and the nature of the transaction itself. The first question which arises is: Is the transferor a person with whom it is reasonable to deal as having full powers? In regard to documents of title, the only holder whose possession appears, commercially, to be in order is almost invariably a person in the trade. No commercial purpose is served by allowing a tramp or a professor to 'duly negotiate' an order bill of lading for hides or cotton not his own, and since such a transfer is obviously not in the regular course of business, it is excluded from the scope of the protection of subsection (4).

The same inquiry is made by the comment as to the nature of the transaction. The quick resale of goods purchased at a suspiciously low price is said to be out of the regular course.

(3) Value is defined as any consideration sufficient to support a simple contract and is consistent with prior law except as it excludes "receiving the document in settlement or payment of a money obligation."<sup>68</sup> It is difficult to see how this is different from "satisfaction of a pre-existing claim."<sup>69</sup> The comment states that, "Where a money debt is 'paid' in commodity paper, any question of 'regular' course disappears, as the case is explicitly excepted from 'due negotiation.'"<sup>70</sup>

#### RIGHTS ACQUIRED BY DUE NEGOTIATION

"Once 'due negotiation' is found, section 7-502 confers on the holder the Code's maximum protection. . . . Title and rights so acquired are not defeated by stoppage or surrender of the goods, by the fact that negotiation was in breach of a duty or that the document had been lost by or stolen from a prior owner, or by a previous sale to a third person."<sup>71</sup> Contrary to prior law in Ne-

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<sup>66</sup> NEB. REV. STAT. §§ 69-428, 429, 432; §§ 88-137, 138, 140 (Reissues 1958).

<sup>67</sup> NEB. REV. STAT. § 69-476 (Reissue 1958).

<sup>68</sup> U.C.C. § 7-501(4).

<sup>69</sup> U.C.C. § 1-201(44).

<sup>70</sup> U.C.C. § 7-501 Comment 1.

<sup>71</sup> BRAUCHER, DOCUMENTS OF TITLE 61 (1958 ed.).

braska,<sup>72</sup> even a thief may confer good title by negotiating a stolen document.

Negotiation, however, cannot give life to a forged document or create a bailee or goods where none exist. Nor can it cure bankruptcy. All of this was true under prior law.<sup>73</sup>

#### DOCUMENT DEFEATED IN CERTAIN CASES

Despite due negotiation, there are five cases set out in section 7-503 in which the purchasers' rights may be defeated.

##### (1) *Unauthorized Bailment*

The paramount title limitation provides that one who has a legal interest or perfected security interest cannot be deprived of it by an unauthorized bailment. This was the prior law.<sup>74</sup> The risk of unauthorized bailment is narrowed by the doctrines of estoppel and agency. A true owner cannot assert a paramount title to goods which he has entrusted to one who has apparent authority to store, ship or sell them. If a merchant is given possession of goods of a kind in which he deals, he has the power to dispose of the rights of the entruster.<sup>75</sup>

##### (2) *Fungible Goods*

Section 7-205 protects the buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods. Such a buyer is one who buys without knowledge of the outstanding interest.<sup>76</sup> It is only necessary that the goods be fungible; they need not be commingled. The warehouseman is still liable to the holder of the warehouse receipt. But this situation ordinarily becomes known only after the insolvency of the warehouseman.

Section 7-207 requires a warehouseman to keep separate the goods covered by each receipt except that fungible goods may be commingled. This is substantially the same as prior law.<sup>77</sup> Section 7-207(2) makes the persons entitled to them tenants in common on a pro rata basis. Where the goods are insufficient to meet all

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<sup>72</sup> NEB. REV. STAT. §§ 69-432; 88-140 (Reissue 1958).

<sup>73</sup> NEB. REV. STAT. §§ 69-433, 438; 88-141, 147 (Reissues 1958).

<sup>74</sup> NEB. REV. STAT. §§ 69-433; 88-141 (Reissues 1958).

<sup>75</sup> U.C.C. § 1-201(9); 2-403(2)(3).

<sup>76</sup> U.C.C. § 1-201(9).

<sup>77</sup> NEB. REV. STAT. §§ 88-122, 123 (Reissue 1958).

the receipts because of overissue, the persons entitled include all holders to whom receipts have been duly negotiated. The UWRA provided that each depositor should be entitled to his pro rata share.<sup>78</sup> Thus, under the prior law, only those who actually deposited goods share in the mass, while under the Code a holder of a duly negotiated receipt will share even though his receipt did not represent an actual deposit of goods.

### (3) *Field Warehousing*

This is a type of security transaction which avoids the necessity of recording a lien on inventory. A warehouse is set up in the field, it may consist of a chicken wire fence, and the goods are placed in control of an agent who may be an employee of the borrower. In such circumstances, the possession of the bailee must be actual and exclusive. If there is a question about such possession, there are probably no goods covered by the document and due negotiation will not protect the lender or the holder.<sup>79</sup>

### (4) *Delivery Orders*

A delivery order may be in negotiable form. If it relates to a negotiable document, until it is accepted it is subject to the rights of anyone to whom the bill of lading or warehouse receipt may be negotiated.<sup>80</sup> In such a case, the bailee cannot safely accept the delivery order without requiring the surrender of the bill of lading or warehouse receipt or conspicuously noting on it any partial delivery.

If the bill of lading or warehouse receipt is non-negotiable, a delivery order may be defeated by a subsequent transfer of the bill of lading or warehouse receipt with notification to the bailee.<sup>81</sup> With respect to non-negotiable documents the Code makes notification to the bailee decisive of the rights, not acceptance.

### (5) *Freight Forwarder Bills*

When a freight forwarder is in the picture, there are usually two bills of lading out; one issued by the freight forwarder to the depositor of the goods and one issued by the carrier to the forwarder. The holder in due course of the freight forwarder's bill prevails over the title held by a holder of the carrier's bill although

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<sup>78</sup> NEB. REV. STAT. § 88-123 (Reissue 1958).

<sup>79</sup> BRAUCHER, DOCUMENTS OF TITLE 67 (1958 ed.).

<sup>80</sup> U.C.C. § 7-503(2).

<sup>81</sup> U.C.C. § 7-504(2).



the carrier is protected by delivery to the holder of the bill issued by the carrier. There was no provision of this kind in prior statutory law.

#### TRANSFER

Section 7-504 deals with rights of a transferee where there is no due negotiation. A negotiable document still may be negotiated if some element of due negotiation is missing. A non-negotiable document can only be transferred.

##### *(1) Negotiable Documents*

The transferee of a negotiable document acquires the rights of his transferor or those rights which he had actual authority to convey. If he is a holder, the bailee is protected in delivering the goods to him.<sup>82</sup> A "holder" is a person in possession of the document which has been issued or indorsed to him.<sup>83</sup> If a prior indorsement is missing, he is not a holder. This leaves him in the position where the bailee cannot deliver the goods to him, but neither can the bailee deliver to anyone else with safety. One remedy of the transferee is to compel his transferor to supply the missing indorsement by suit.<sup>84</sup> The prior law required the transferee to hold "for value" in order to compel the indorsement.<sup>85</sup> This requirement is eliminated by the Code. The due negotiation takes place when the missing indorsement is supplied, and it does not relate back to the original transfer.

##### *(2) Non-negotiable Documents*

With respect to a non-negotiable document, a transfer may be defeated in ways that are not applicable to a negotiable document. Until the transferee notifies the bailee, the rights of the transferee may be defeated "(a) by creditors of the transferor who could treat the sale as void under section 2-402."<sup>86</sup>

Under the prior law, any creditor may attach<sup>87</sup> or may notify the bailee of his claim. Section 2-402(2) limits this right to the case where the retention by the seller is fraudulent as to the creditor and further provides that retention by the transferor in good faith

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<sup>82</sup> U.C.C. § 7-403(a).

<sup>83</sup> U.C.C. § 1-201(20).

<sup>84</sup> U.C.C. § 7-506.

<sup>85</sup> NEB. REV. STAT. §§ 69-435; 88-143 (Reissues 1958).

<sup>86</sup> U.C.C. § 7-504(2)(a).

<sup>87</sup> NEB. REV. STAT. §§ 69-434; 88-142 (Reissues 1958).

and current course of trade for a commercially reasonable time is not fraudulent. This would appear to limit the rights of creditors to those existing at the time of the transfer<sup>88</sup>

(b) by buyers from the transferor if the buyer has obtained delivery of the goods from the bailee or has notified the bailee;

(c) as against the bailee by good faith dealings by the bailee with the transferor.

#### DIVERSION UNDER STRAIGHT BILL OF LADING

Section 7-504(3) preserves the rights of the bailee and third persons to whom the goods may be diverted by the consignor. Section 7-303 gives the consignor a right to divert the goods by instructions to the carrier with respect to a non-negotiable bill of lading. Where such instructions are honored by the carrier, the Code protects the third person who bought the goods from the consignor in the regular course of business, and protects the bailee for delivery to the subsequent purchaser.

Of course the shipper may have defaulted on his contract with the consignee and may be held liable as for conversion, but if he is insolvent this is little comfort to the consignee who cannot recover the goods in the hands of the carrier or the subsequent purchaser.

There is no prior Nebraska law on the subject.

#### STOPPAGE OF DELIVERY

Section 7-504(4) gives the seller a right to stop delivery by the bailee as provided in section 2-705. By this section the right to stop delivery is given for insolvency of the buyer, the repudiation or failure to make a payment due before delivery, or any other reason for which the seller has the right to withhold or reclaim the goods.

Section 7-504(4) relates only to a non-negotiable document, but section 2-705 makes it clear that the right to stop delivery applies as well to a negotiable document at least until it is negotiated to the buyer. The bailee upon a stoppage of delivery is entitled to be indemnified by the seller against any loss or expense.

The provisions generally are in accord with prior law except that the right to stop under the Uniform Acts was limited to goods "in transit."<sup>89</sup> The Code provisions relate to goods in possession of the bailee.

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<sup>88</sup> U.C.C. § 7-504(2) (b) (c).

<sup>89</sup> NEB. REV. STAT. §§ 69-457, 458, 459 (Reissue 1958).

## ATTACHMENT

When a negotiable document is outstanding, the title and rights of a holder in due course cannot be defeated by surrender of the goods by the bailee even under compulsion of judicial process.<sup>90</sup> Section 7-602 is designed to protect the holder and the bailee with respect to judicial process and generally provides that no lien attaches by reason of the process unless the document is first surrendered or its negotiation enjoined. In general, it follows prior law<sup>91</sup> except that the Code contains a new provision which gives a bona fide purchaser of the document without notice of the process freedom from the lien of the judicial process.

## LIABILITIES OF TRANSFEROR

The indorsement of a document of title is not like the indorsement of a check or promissory note; it is merely a conveyance of a property interest. Section 7-505 provides that such an indorsement does not make the indorser liable for defaults by the bailee or by previous indorsers. It is consistent with prior law.<sup>92</sup>

Section 7-502(1) (d) provides that the indorser of a negotiable delivery order undertakes to obtain the acceptance of the bailee. This is new.

Section 7-507 provides the warranties which are imposed on one who negotiates or transfers a document of title otherwise than as a mere intermediary. A mere intermediary is defined in section 7-508 as a collecting bank primarily.

The warranties are those contained in prior law<sup>93</sup> except that the Code does not contain any warranties that the goods are merchantable or fit for a particular purpose. The comment to the Code states that these are warranties which pertain properly to the contract of sale of the goods and not to a transfer of the document. If they are appropriate to the contract of sale they are made applicable by Code sections 2-312 to 2-318. The warranties may be changed by agreement.

Section 7-508, which is new, sets forth an exception to section 7-507 with respect to a mere intermediary who is defined as a collecting bank or other intermediary known to be entrusted with

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<sup>90</sup> U.C.C. § 7-502(2).

<sup>91</sup> NEB. REV. STAT. §§ 88-125, 126 (Reissue 1958).

<sup>92</sup> NEB. REV. STAT. §§ 69-437; 88-145 (Reissues 1958).

<sup>93</sup> NEB. REV. STAT. §§ 69-436; 88-135 (Reissue 1958).

documents on behalf of another or with collection of a draft. The only warranty of such an intermediary is its own good faith and authority.

The reporter of this article says that the reason for this section was to eliminate the elaborate indorsement clauses used by some banks, when collecting drafts secured by documents of title, to disclaim responsibility for the genuineness of the document or the condition of the goods.<sup>94</sup>

The exemption of the bank applies even though it has purchased or made advances against the claim or draft to be collected. It is possible that if the bank purchased the document along with the draft, it might lose its status as an intermediary and become subject to the warranties of section 7-507.

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<sup>94</sup> BRAUCHER, DOCUMENTS OF TITLE 82 (1958 ed.).